IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No.216 of 1996

Reserved on: August 06, 2007

Decided on*: *September 20, 2007.

Ganga Dhar ***.....Appellant.***

VERSUS

Himma Devi & Ors. ***.....Respondents.***

Coram

The Hon'ble Mr.Justice Kuldip Singh, Judge.

Whether approved for reporting?[1] No

For the Appellant: **Mr.N.K.Thakur, Advocate.**

For the Respondents: **Mr.K.D.Sood with Ms.Nidhi Chawla, Advocates, for respondents No.1(a) to 1(g).**

Kuldip Singh, Judge

The appellant / plaintiff is in appeal against the judgment and decree dated 12.1.1996 passed by learned Additional District Judge, Kullu in Civil Appeal No.70/95 confirming the judgment and decree dated 15.6.1995 passed by learned Sub Judge 1st Class, Kullu in Civil Suit No.132/1988.

2. The facts, as emerge from the plaint, in brief, are that appellant is a tenant at will in possession under respondent No.2 on land comprising Khasra No.625 vide Jamabandi for the year 1976-77 Phati Dhalpur, Kothi Maharaja, Tehsil and District Kullu. The adjacent

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[1] ***Whether the reporters of the local papers may be allowed to see the Judgment? Yes***

land comprised in Khasra No.616 was recorded in possession of predecessor of respondents No.1(a) to 1(g) as tenant at will under respondent No.2. The father of the appellant had constructed two storeyed building more than 50 years ago which is shown by letters ABCD in the site plan attached. The appellant has inherited said building after the death of his father. The predecessor of respondents No.1(a) to 1(g) has also constructed a two storeyed building on Khasra No.616 as shown in site plan attached with the plaint by letters EFGH. The boundaries of these two Khasra numbers are touching together. In between two houses, there is a vacant space of 4' wide shown by letters FADG. According to the appellant, this vacant land is part of Khasra No.625 and is owned and possessed by him and at the time of construction of the house of the appellant a drain was also constructed on vacant land shown by letters I and J. The vacant land owned and possessed by appellant is used by him and his family members for cleaning the aforesaid drain. On 27.7.1988 the predecessor of respondents No.1(a) to 1(g) started digging with a view to grab the aforesaid vacant land but despite the protests of appellant he raised three concrete pillars 3-4 feet in height on this land which pillars have been shown by letters KLM. The predecessor of respondents No.1(a) to 1(g) by constructing concrete pillars has encroached vacant land of the appellant comprising Khasra No.625 by leaving only about 4 inches open space. The predecessor of respondents No.1(a) to 1(g) threatened to raise more construction. The appellant then filed a suit

for possession of the open land shown by letters FADG by demolishing the pillars constructed by predecessor of respondents No.1(a) to 1(g) thereon and by restoring the Gali into its original position along with permanent prohibitory injunction restraining any further construction on land shown by letters EADG and obstructing the drain of the appellant.

3. The suit was contested by predecessor of respondents No.1(a) to 1(g) mainly on the ground that in Civil Suit No.279 of 1966 for possession by way of pre-emption Khasra No.616 measuring 0-2 Biswas and two storeyed slate roof house measuring 40’ x 20’ along with cattle shed standing thereon, the possession of the same was delivered to him and since then he was coming in possession of Khasra No.616 and structure standing thereon. He demolished the aforesaid old house and constructed one storeyed house over a portion of Khasra No.616. He admitted that boundaries of Khasra No.625 and 616 are touching each other. He submitted that in between the two houses there is Gali about 2’ to 3’ wide which is owned and possessed by him. He denied that Gali is part of Khasra No.625. He also denied existence of drain in the Gali. In the alternative, he submitted that in case Gali is found to be in Khasra No.625 in that event also he had been coming in possession of this portion right from the decree passed by the Court on 29.11.1966 and became owner by way of adverse possession. He submitted that he had raised pillars on his own land and had completed the construction

of one storeyed house except for internal finishing. The suit was decreed by learned Sub Judge 1st Class, Kullu on 23.11.1993 but in appeal filed by predecessor of respondents No.1(a) to 1(g), learned Additional District Judge, Kullu set aside the judgment and decree and remanded the case back to trial Court for impleading Devta Shri Thakar Sita Ram of Khoriropa, Phati Dhalpur, Kothi Maharaja as party to the suit and then decide the suit in accordance with law with further direction to dispose of the suit after deciding the objections of predecessor of respondents No.1(a) to 1(g) on the report of Local Commissioner Ext.OW-1/A.

4. The suit after remand was dismissed by learned Sub Judge on 15.6.1995. The appellant filed appeal which has been dismissed by learned Additional District Judge, Kullu by impugned judgment and decree. Hence, appellant is in second appeal. During the pendency of appeal respondent Prem Chand alias Prem Nath died and his legal representatives being respondents No.1(a) to 1(g) were brought on record. The appeal has been admitted on the following substantial questions of law:-

(i) Whether the impugned judgment and decree are the result of mis-interpreting and mis-construction of the oral as well as documentary evidence?

(ii) *What is the effect of remand order, on the judgment and decree of the learned trial Court dated 23.11.1993?*

(iii) *Whether the impugned judgment and decree are un-sustainable inasmuch as reversing its own judgment on merits?*

(iv) *Whether the impugned judgment and decree are vitiated by mis-construction of the report of Local Commissioner?*

(v) *Whether the Courts below are justified in brushing aside the legal and evidentiary value of three consecutive reports of the Local Commissioner?*

5. I have heard the learned counsel for the parties and gone through the record. The learned counsel for the appellant has submitted that two Courts below have mis-interpreted and misconstrued the oral and documentary evidence on record. The trial Court wrongly assumed the jurisdiction to review earlier judgment just for the reason that report of the Local Commissioner was set aside. The report of the Local Commissioner has been misconstrued and the lower Courts have erred in brushing aside reports of the Local Commissioners. The learned counsel for respondents No.1(a) to 1(g) has supported the impugned judgment, decree. He has submitted that it was for the appellant to prove alleged encroachment on his land but he failed to prove any encroachment made by predecessor-in-interest of respondents No.1(a) to 1(g), hence, the Courts below have rightly dismissed the suit.

6. The substantial questions of law are being disposed of together as it is convenient to decide all substantial questions of law collectively in the facts and circumstances of the case. The appellant has filed the suit for possession of vacant land which is shown by letters F,A,D,G and by demolition of illegal structure shown by letters K,L,M encroached upon by predecessor-in-interest of respondents No.1(a) to 1(g). He has further prayed relief of permanent prohibitory injunction against raising any further construction on the alleged vacant path shown by letters F,A,D,G. The predecessor-in-interest of respondents No.1(a) to 1(g) had denied the claim of appellant. The claim of the appellant for possession and permanent prohibitory injunction is with respect to the land shown by letters F,A,D,G and K,L,M in the site plan filed with the plaint. The appellant appeared as PW-1 and in his statement has placed on record plan Ext.PB which according to the appellant was prepared by Chet Ram. The appellant did not examine Chet Ram to prove plan Ext.PB. The appellant has miserably failed to prove on record encroachment made by predecessor-in-interest of respondents No.1(a) to 1(g) on his land by placing on record legal evidence. The oral evidence adduced by appellant is not sufficient to prove alleged encroachment made by predecessor-in-interest of respondents No.1(a) to 1(g) on the land of appellant. It was the duty of the appellant to identify the alleged encroachment by leading proper legal evidence. The two Courts below have rightly come to the conclusion that appellant has failed to

prove encroachment on his land by predecessor-in-interest of respondents No.1(a) to 1(g) by raising construction or otherwise.

7. The learned counsel for the appellant has submitted that there is a boundary dispute between the parties and the proper course to identify the encroachment is by way of demarcation by Local Commissioner on the spot. He has submitted that this Court of its own should exercise power for appointment of Local Commissioner to demarcate the land in dispute in order to identify the encroachment of land, such order will serve the ends of justice. He has relied ***Braham Datt*** Versus ***Prem Chand & Others [2001 (1) S.L.J. 431] and Bali Ram*** *Versus* ***Mela Ram [AIR 2003 HP 87].***

8. The suit was filed on 30.7.1988. The appellant filed suit on the basis of plan which he filed along with the plaint. The appellant has appeared as PW-1 and in his statement he has placed on record plan Ext.PB, according to appellant the encroachment made by predecessor-in-interest of respondents No.1(a) to 1(g) has been shown in plan Ext.PB which was prepared by Chet Ram. The appellant did not examine Chet Ram to prove encroachment made by predecessor of respondents No.1(a) to 1(g) on the land of the appellant. It was never the case of the appellant that he is not aware of the encroachment made by predecessor of respondents No.1(a) to 1(g) on his land, rather appellant got the alleged encroachment identified by filing plan with the plaint. The trial Court on 1.8.1988 appointed Shri H.N.Dhar, Advocate Local Commissioner to visit the

spot and report about the extent of construction carried out on the spot. Shri H.N.Dhar submitted his report dated 3.8.1988. Thereafter with the consent of the parties vide order dated 31.8.1988 the trial Court appointed Tehsildar Kullu as Local Commissioner to demarcate the land in dispute. The Tehsildar Kullu submitted his report Ext.DW-1. The trial Court even inspected the spot on 30.12.1988 but nothing special was found on the spot. On 16.3.1990 request was made by the counsel for the parties for appointment of fresh Local Commissioner and the trial Court accordingly rejected Local Commissioner's report Ext.DW-1/A (sic). The trial Court on 23.11.1991 again appointed District Revenue Officer, Kullu as Local Commissioner to visit the spot and demarcate the land in dispute. The District Revenue Officer accordingly submitted his report Ext.OW-1/A. The suit was decreed on 23.11.1993 but in appeal the suit was remanded to trial Court.

9. The trial Court after remand vide order dated 15.5.1995 rejected report Ext.OW-1/A. The arguments were heard in the trial Court on 6.6.1995 and the suit was fixed on 15.6.1995 for orders. On 15.6.1995 appellant filed another application for appointment of Local Commissioner seeking a direction to inspect the spot and give detail report whether the suit land has been encroached upon by predecessor of respondents No.1(a) to 1(g), if so how much. This application was dismissed by the trial Court and the suit was dismissed. These details have been referred in order to show that

how appellant leisurely prosecuted his suit. In first appellate Court, in the grounds of appeal, the appellant has raised grievance against the order passed by trial Court refusing to appoint Local Commissioner but in the grounds of appeal, in this Court no such grievance has been raised.

10. In the present case, it is not the case of the appellant that he is not aware of alleged encroachment made by predecessor of respondents No.1(a) to 1(g), rather his specific case is that his land has been encroached as shown in site plan Ext.PB. The appellant opted not to prove site plan Ext.PB by legal evidence. He did not examine Chet Ram who allegedly prepared site plan Ext.PB. The appellant having failed to prove encroachment on the suit land by proving plan Ext.PB by legal evidence wants to take another chance to prove alleged encroachment and, therefore, he has made prayer to appoint Local Commissioner to demarcate the land in dispute and identify the alleged encroachment. The appeal was filed in the year 1996, now at the time of hearing of the appeal oral request on behalf of appellant for appointment of Local Commissioner to demarcate the suit land does not appear to be bonafide. The appellant did not take any step for 11 years in the present appeal for appointment of Local Commissioner. In the grounds of appeal, the appellant has asserted that there was no occasion for the learned trial Court to set aside three reports of different Local Commissioners. In other words, it is not the case of the appellant that the Local Commissioners' reports are

defective. As discussed above, the appellant has not led legal evidence to prove site plan Ext.PB. The appellant just wants to make an attempt and take chance to have another report regarding the disputed land to prove his case which he has miserably failed to prove. The Local Commissioner is to be appointed in a genuine case and not on the asking of the present type of appellant keeping in view the facts and circumstances of the present case. This is not the purpose of appointment of Local Commissioner.

11. In *Braham Datt's case (supra),* this Court has held that **when whatever was within the power of plaintiff to show that a piece of land owned by him has been encroached by the defendants has been done by him** and if the revenue agency had prepared a report which may not be according to the rules the case of the plaintiff could not have been thrown out simply for the lapses committed by the revenue agency / Tehsildar in carrying out the demarcation. In the present case, appellant opted not to examine Chet Ram to prove alleged encroachment shown in plan Ext.PB. It is not a case where appellant has done whatever was possible within his power. The appellant was at liberty to get the demarcation conducted of suit land from revenue agency without the intervention of the Court. He never adopted that course. In the facts and circumstances of the present case, ***Braham Datt*** Versus ***Prem Chand & Others [2001 (1) S.L.J. 431] and Bali Ram*** *Versus* ***Mela Ram [AIR 2003 HP 87]*** are not applicable. The facts in the present case are different.

12. The trial Court has visited the spot and found nothing special on the spot. Moreover, whatever is the value of the various Local Commissioners' reports but the fact remains that the alleged encroachment is very small and that too the appellant has failed to prove. The two Courts below have rightly appreciated the material on record. The trial Court after remand proceeded to decide the suit in accordance with law. The trial Court was very much competent to dismiss the suit on the basis of material on record even though before remand the suit was decreed. The Local Commissioners' reports have been rightly considered by the Courts below keeping in view their legal value. The appellant has failed to make out any case for interference. The substantial questions of law No.(i) to (v) are decided against the appellant.

13. The result of the above discussion is that the appeal is dismissed with no order as to costs.

September 20, 2007. **(*Kuldip Singh*)**
(soni) ***Judge***